APPENDIX E

United States Court of Appeals
for the District of Columbia Circuit

(No. 71-1841)
(C.A. No. 3661-69)

MARK AVRICH APPELLANT

v.

SECRETARY OF THE NAVY APPELLEE

NOTICE OF APPEAL

Notice is hereby given that appellee, the Secretary of the Navy, appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252, from the judgment of this Court entered March 20, 1972, reversing the judgment of the District Court.

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JUL 30
MICHAEL RODAK, J

Supreme Court of the United States

October Term, 1972

No. 72-1713

SECRETARY OF THE NAVY,

Appellant,

v.

MARK AVRECH,

Appellee.

On Appeal from the United States Court of Appeals
for the District of Columbia Circuit

MOTION TO AFFIRM

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Supreme Court of the United States

October Term, 1972

No. 72-1713

SECRETARY OF THE NAVY,

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MARK AVRECH,

Appellee.

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MOTION TO AFFIRM

Appellee moves this Court, pursuant to Rule 16, to affirm the judgment of the Court of Appeals on the ground that the decision below is so manifestly correct as not to need further argument before this Court.

Statement

The Court of Appeals, below, in a unanimous opinion written by Mr. Justice Clark and concurred in by Judges Wright and Wilkey, invalidated a court-martial conviction of the appellee on the ground that Article 134 of the Uniform Code of Military Justice, 10 U.S.C. §934, is unconstitutionally vague. After reviewing the history of Article 134 and its current usage by the military, the court below concluded that:

> "... Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforc-

ing authorities . . . Indeed, the only apparent purpose of Article 134 is to act as a catchall for varied types of improper misconduct not otherwise covered by the Code." (J.S. 20)[1]

Argument

1. Appellant argues (J.S. 6) that the constitutionality of Article 134 presents a substantial question because of an alleged conflict with the prior decisions of this Court in *Smith v. Whitney*, 116 U.S. 167, and *Dynes v. Hoover*, 20 How. 65, and because Article 134 has established "an ascertainable standard of proscribed conduct" by virtue of "its history, case law, and the approximately seventy specific offenses cognizable under the Article which have been explicitly included in the Manual for Courts-Martial" (J.S. 7). Neither of these arguments is substantial.

As Justice Clark pointed out below, "the old authorities cited bear little weight" (J.S. 21). They were decided in 1858 (*Dynes v. Hoover*), and 1886 (*Smith v. Whitney*). They did not, and obviously could not, have considered the issue of whether Article 134 was void for vagueness in the light of the modern doctrine of vagueness which was first enunciated by this Court in *Connally v. General Construction Co.*, 269 U.S. 385 (1926). It is clear that under modern standards Article 134 cannot pass constitutional muster. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), *Staub v. Baxley*, 355 U.S. 313 (1958), *Gelling v. Texas*, 343 U.S. 960 (1952). In addition, *Dynes v. Hoover* and *Smith v. Whitney* predated the growth of the doctrine that verdicts of courts could be collaterally attacked by habeas corpus or otherwise on constitutional grounds other than the bare question of jurisdiction. *Johnson v. Zerbst*, 304 U.S. 458 (1938). Burris and Jones, *Civilian Courts and Courts-Martial—The Civilian Attorney's Perspective*, 10 Amer. Crim. Law Review 139,

1. "J.S." refers to the Jurisdictional Statement.

142 (1971). As Justice Clark noted below (J.S. 24), those cases dated from an era when the Supreme Court "adopted a hands-off policy towards courts-martial" holding that "the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . The simple inquiry, the test, is jurisdiction."

Justice Clark, in addition, fully reviewed the arguments made by appellant here based on the history of Article 134, its usage, and its implementation in the Manual. He concluded:

> "Interpretation of the General Article through the Manual to proscribe some seventy explicit offenses, rather than evidencing settled and understandable meaning, indicates just the contrary. For example, not until 1951 did the disloyalty charge prosecuted here become a badge of infamy within reach of the Manual. . . . [W]e find the 1968 edition of the Manual continues to expand their number. Indeed, the only apparent purpose of Article 134 is to act as a catchall for varied types of unforeseen misconduct not otherwise covered by the Code." (J.S. 20).
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> "And the opinions of the Military Court of Appeals add more weight to this conclusion. It has held repeatedly that the Manual does not limit or confine Article 134. The Manual is not exhaustive of Article 134 misconduct; its crazy quilt of offenses does not cover Article 134's bed . . . Further, the inclusion of specific conduct in the Manual specifications does not necessarily mean the conduct is punishable under the Article . . . These cases demonstrate it is neither necessary nor sufficient that a serviceman's conduct fit a Manual specification in order for him to incur criminal liability under Article 134. Nothing could point more accusingly to the vagueness of Article 134 than for the Court of Military Appeals to say that in the final analysis, the Manual is but a mini-digest of the roving character of Article 134,

whose vague and indefinite language is absolutely co
trolling. Clearly the broad net of Article 134 will cat
an accused although the Manual does not." (J.S. 22-23

In short, all of the considerations and arguments advanc
in appellant's jurisdictional statement were fully considere
analyzed and discussed in Justice Clark's opinion and the app
lant presents nothing new which merits consideration by th
Court. Accordingly, the judgment below should be affirmed
the basis of Justice Clark's opinion. Further, as noted in t
jurisdictional statement (p. 6, fn. 5), the only other appella
court to consider the question unanimously reached the sa
result as the court below. *Levy v. Parker*, ___ F.2d ___ (3
Cir. April 18, 1973).

2. It should further be noted that the specific char
levied against appellee under Article 134, an attempt to publi
a "disloyal" statement, was held to be unconstitutionally vag
in violation of the Fifth Amendment and unconstitutional
overbroad in violation of the First Amendment in *Stolte, et*
v. Laird, 353 F.Supp. 1392 (D.D.C. 1972). Significantly, t
government did not appeal this decision, thus implicitly reco
nizing its correctness. Accordingly, the judgment below wou
in any event have to be affirmed on the authority of the *Stol*
case, which, since it was not appealed by the governme
remains the law in the District of Columbia.[2]

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2. Appellee raised, in the courts below, the question of the vag
ness of the words "disloyalty" and "disaffection," used in the cou
martial charge here. However, the Court of Appeals did not reach the iss
in view of its holding with respect to Article 134. In addition, appell
argued below that his statement was protected free speech under the Fi
Amendment, an issue which was also not reached by the court below (J.
15).

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 30, 1973